

Sears, Roebuck and Co.
Corporate Governmental Affairs
Sears House
633 Pennsylvania Avenue, N.W.
Suite 600
Washington, D. C. 20004

RANDOLF H. AIRES
VICE PRESIDENT

May 26, 1992

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202/737-4900
Fax: 202/347-7127

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Federal Communications Commission
Office of the Secretary

Ms. Donna R. Searcy
Secretary
Federal Communications Commission
1919 M Street, N.W.
Washington, D.C. 20554

RE: The Telephone Consumer Protection Act of 1991
CC Docket No. 92-90

Dear Ms. Searcy:

Attached are comments of Sears, Roebuck and Co. in response to the Commission's Notice of Proposed Rulemaking in the above-captioned matter. An original plus nine copies are included to provide a personal copy for each Commissioner.

Very Truly Yours,

Randolf H. Aires

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MAY 26 1992

Before the
FEDERAL COMMUNICATIONS COMMISSION Federal Communications Commission
Washington, DC 20554 Office of the Secretary

In the Matter of)
)
The Telephone Consumer) CC Docket No. 92-90
Protection Act of 1991)

**COMMENTS OF
SEARS, ROEBUCK AND CO.**

Sears, Roebuck and Co. (Sears) hereby submits its comments in response to the Notice of Proposed Rulemaking (NPRM), released by the Commission on April 17, 1992, in the above-captioned proceeding.

I. INTRODUCTION

Sears endorses the Commission's goal of writing implementing rules which strike a proper balance between the protection of the privacy concerns of the "Telephone Consumer Protection Act of 1991" (TCPA) and the continuation of beneficial and useful business services offered via the telephone. Sears urges that any FCC action be consistent with the President's signing statement on the TCPA which calls for implementing the Act at the least possible cost to the economy.

Sears is a broadly diversified company consisting of the Sears Merchandise Group, Allstate Insurance Group, Coldwell Banker Real Estate Group, Dean Witter Financial Services Group and a large number of affiliates, divisions, agents and licensees. Many of these entities have their own distinct marketing and promotion programs which include responsible solicitation by telephone. It is our hope that the final

regulations do not unduly burden these current financially successful and consumer-focused marketing practices.

II. AUTOMATIC DIALING RECORDED MESSAGE PLAYERS (ADRMPs)

A. General. Sears generally supports the FCC's proposal on prohibited uses of ADRMPs and the disconnect requirements for such devices. ADRMP abuses, involving calls to emergency lines, and prolonged, hard-sell and otherwise irritating recorded sales pitches, were the focus of attention during the Congressional deliberations on telephone solicitations and the driving force behind enactment of the TCPA. Also, as cited by the Commission, ADRMP-related complaints accounted for the vast majority of all complaints on telephone solicitations received by the Commission in 1991. The specific actions proposed by the Commission are therefore clearly warranted in this area.

B. Automatic Dialing Equipment. The final rule, however, should draw a clear distinction between the ordinary use of automatic dialing equipment and the automated delivery of a recorded message. Automatic dialing equipment is used for the simple purpose of automatically dialing pre-programmed telephone numbers without delivery of any recorded message. Upon an answer by a called party, connection is promptly made to a live operator who conveys a live message. Such calls, merely utilizing a labor-saving device, should not be subject to any of the ADRMP-related rules since they pose no threat to privacy rights.

C. Exemption for Certain Commercial Calls. Sears supports the Commission's proposed exemption for recorded calls of a

commercial nature that do not include the transmission of an unsolicited advertisement.

Possible uses include a message to the effect that a catalog order is ready to be picked up or asking that a called party stay on the line for connection with a live operator.

Consistent with the TCPA's legislative history and section 227(b)(2)(B), the final rule should specify that such exemption applies to debt collection-related calls; messages conveying arrival, shipment, scheduling or delivery information regarding products and/or services; and, messages that otherwise are incidental to a commercial transaction. These types of calls pose little if any threat to privacy rights and, in most instances, are actually welcomed by the called parties.

D. Disconnect Requirements.

The technical standard required by section 227 (d)(3)(B) should clarify that the "notification" must be the signalling protocol that is transmitted from the called party back to the originating equipment. Also, the standard should be consistent with current technical capabilities.

III. LIVE OPERATOR TELEPHONE SOLICITATIONS

A. General. As indicated in the TCPA's findings section, telemarketing sales in 1990 amounted to \$435 Billion. This financial success of telemarketing proves its legitimacy and value to society. While the estimated number of solicitation calls is 18 million per day, the complaints on file with the FCC are incredibly small in comparison. Even an accounting of complaints filed at the state and local levels would be a very

small percentage of the total number of calls made.

The great majority of telephone solicitations are made by reputable companies that respect privacy rights and make every reasonable effort to avoid calling customers who do not want to receive telephone solicitations. Calling such customers is simply counterproductive from a business perspective. The statistics indicated above suggest that the voluntary mechanisms in place today are generally working and that a federally-mandated suppression program is not required at this time.

If the Commission determines that regulation of live telephone solicitations is necessary in this proceeding, it should craft rules with minimal impact on those companies already taking a responsible approach in telephone solicitations.

It should be noted that any increased expense to business as a result of new regulation and litigation is likely to be passed on to the consumer in the form of higher prices for goods and services.

B. National Database. Sears fails to see any necessity for a federally-mandated national database of persons objecting to telephone solicitations. As previously indicated by the Commission, the costs of developing, updating and disseminating such a listing would certainly run into the tens of millions of dollars. Maintaining an attendant enforcement bureaucracy would add millions of dollars to the cost. Any added benefits to the general public from such a listing would be questionable, especially in light of current voluntary efforts to avoid calls to objecting persons. In addition, the listing would do nothing

to prevent political, non-profit or charitable calls. As noted by the Commission, there would also be privacy concerns over potential unauthorized use of such a listing. The potential costs clearly outweigh any potential benefits from a federally-mandated national database.

C. Established Business Relationship. The TCPA provides an exemption from the term "telephone solicitation" for calls made to persons with whom the caller has an established business relationship. While the House committee report on H.R. 1304 suggests a narrow interpretation of that term, the Senate report on S. 1410 properly leaves the interpretation up to the Commission. The term, for all practical purposes, would only have effect if the Commission chooses an option along the lines of a federally-mandated national database. Sears recommends, in such event, that the term be reasonably defined to include calls to persons who have:

1. an existing business relationship with the person or entity making the telephone solicitation,
2. within a reasonable period of time prior to the telephone solicitation, been involved in a transaction, negotiation, application, or inquiry with the person or entity making the telephone solicitation, or
3. within a reasonable period of time prior to the telephone solicitation, been involved in a transaction, negotiation, application, or inquiry with a person or entity publicly advertised as being affiliated with, a subsidiary, licensee or parent company of, or otherwise

related to, the person or entity making the telephone solicitation.

This definition would not pose any significant problems from an enforcement perspective and would not, from a consumer's perspective, pose any significant threat to reasonable expectations of privacy.

Any narrow definition of the term, however, could unnecessarily limit offers of new, complementary or supplementary goods and services. It could also serve to penalize companies, and affiliates, divisions, agents and licensees thereof, which have, through substantial advertising and other promotion, created a "family of companies" image and reputation.

A vague definition on the basis of "substantial relationship" of products or services or affiliation of a company's divisions or subsidiaries would result in a continuous stream of inquiries and advisory opinions drawing fine lines between every conceivable type of product or service.

D. Local Telephone Solicitations. Consistent with section 227(c)(1)(C) of the TCPA and its legislative history, Sears recommends an exemption for telephone solicitations placed within a local marketing area, whether interstate or intrastate, by an entity whose primary business activity is limited to that local marketing area. As indicated by various floor statements in the House and Senate, local business solicitors already have an accountability within the community by virtue of their reputation as businesses and as individuals. All local businesses have similar accountabilities regardless of whether such are

small businesses, second class mail permit holders or local affiliates, divisions, agents, licensees or other units of national or non-local concerns.

Any exemption should equally apply to all such entities. An exemption for only local independent small businesses would unfairly discriminate against competing persons or entities whose business activity is similar in every significant respect except for a link with a national or non-local concern.

Many of these local entities, while linked with a national or non-local concern, only consist of a dozen or fewer employees. To subject their telephone solicitations to the same procedures and restrictions as may be applied to a centralized national telemarketer would result in prohibitively high administrative costs.

E. Recommendation. Should the Commission determine that a new regulatory mechanism is necessary to protect the public against unsolicited telephone calls, Sears suggests an approach as follows:

- (1) Companies and/or affiliates, divisions, agents or licensees thereof who choose to conduct non-local telephone solicitations would be required to create an applicable written policy to protect the rights of consumers.
- (2) Such policy would include: use of an industry, trade association, or in-house (company-wide or affiliate, division, agent or licensee-specific) do-not-call list, or a combination of such lists; time of

day restrictions; courtesy guidelines; and, other consumer-oriented procedures.

- (3) In private enforcement actions under section 227(c)(5) of the TCPA, it would be prima facie evidence of compliance with the Commission's rules if a named entity files with the court a copy of the relevant policy along with a sworn affidavit from a responsible official of that entity to the effect that the policy is being carried out with all due diligence.

There is a very real concern that the private enforcement provision of the TCPA could serve as the basis for numerous unwarranted, if not frivolous, lawsuits and claims. The provision was not the subject of any significant discussion or analysis during committee or floor deliberations in Congress. Since it can be exceedingly difficult and time consuming to specifically prove or refute a claim of an improper call, any Commission regulations should give substantial weight to good faith efforts toward compliance. Evidence of a reasonable written policy and general adherence to such policy should serve to relieve a company of any liability in most cases.

Commission rules should also be flexible when applied to companies consisting of various affiliates, divisions, agents and licensees. It would be exceedingly difficult and expensive, and next to impossible from a compliance perspective, to tie together literally hundreds of units placing telephone solicitations under a single suppression mechanism. Such companies should have discretion in designing and implementing company-wide and/or

affiliate, division, agent or licensee-specific suppression lists.

IV. CONCLUSION

Sears shares the concerns expressed by the drafters and supporters of the TCPA and recommends implementation along the lines discussed above. If regulation of live operator telephone solicitations is deemed necessary, the approach recommended above would ensure reasonable efforts toward protecting the privacy of consumers; provide flexibility for diverse business operations; and, minimize the potential for increased regulatory, administrative and litigation expense.

It should be noted that whatever course is determined by the Commission can and should be reviewed in the future to assure that the rules meet consumer and business needs and otherwise are adapted to changing market conditions.